

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2012

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
JOHN P. HAZEL,

Petitioner-Appellant,

-against-

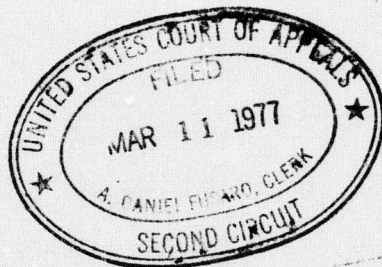
NORMAN CARLSON, Director,
U.S. Bureau of Prisons; and
GEORGE C. WILKINSON, Warden,
Federal Correctional Institution,
Danbury, Connecticut,

Respondents-Appellees.
-----X

Docket No. 77-2012

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT



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JOHN P. HAZEL,
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-against-
NORMAN CARLSON, Director,
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NORMAN CARLSON, Director,
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Respondents-Appellees.

Whether the transfer of appellant from the NARA unit at Danbury to the general prison population at Lewisburg violates appellant's right to treatment under Title II of NARA and the Fifth Amendment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the District of Connecticut (The Honorable Jon O. Newman) entered October 21, 1976, denying without a hearing appellant's pro se application for mandamus relief or for a writ of habeas corpus.

On November 4, 1976, the district court granted appellant's application to proceed in forma pauperis. This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel, pursuant to the Criminal Justice Act.

Statement of Facts

On July 1, 1972, appellant John P. Hazel was sentenced to the custody of the Attorney General to a commitment for treatment for an intermediate period not to exceed ten years pursuant to Title II of the Narcotics Addict Rehabilitation Act ("NARA") (18 U.S.C. §4251 et seq.).¹ On April 11, 1975, appellant was paroled to aftercare under the Act. Appellant subsequently was taken into custody for a parole violation, and was returned to the Federal Correctional Institution at

¹See opinion of the court below, annexed as "B" to the separate appendix to appellant's brief.

Danbury, Connecticut -- his original place of confinement on the NARA sentence -- to serve out the NARA commitment. In revoking parole, the Board noted that appellant "need[s] additional institutional treatment, specifically drug counseling to enhance [his] capacity to lead a law abiding life." Appellant's next institutional review hearing by the Parole Commission is scheduled for August 1977;² he has approximately six years remaining on his NARA commitment.

On April 21, 1976, appellant was sentenced by the District of Columbia Superior Court on a conviction of grand larceny to a two-to-eight-year prison term, the sentence to run consecutively to appellant's NARA commitment. The District of Columbia sentencing judge recommended that appellant's consecutive sentence be served at Danbury. Nevertheless, on July 28, 1976, appellant was informed that he was being recommended for transfer to the Federal Penitentiary at Lewisburg, Pennsylvania.³ According to the Government, "the authorities at Danbury have manifested an intention to transfer the petitioner to the Penitentiary at Lewisburg and would, indeed, do so but for the pendency of this litigation." The reason for

²See appellant's motion for preliminary injunction and temporary restraining order at 2, 4, set forth as "C" to the separate appendix to appellant's brief. Also included as part of Appendix C is appellant's rebuttal to the Government's answer.

³See Appendix C at 2-3.

the transfer was to implement the "guidelines" established for Danbury, which permit transfer out of that institution of inmates serving more than five years' imprisonment.⁴ Appellant moved, on September 20, 1976, to stop the transfer, alleging that the Federal Penitentiary at Lewisburg was an inappropriate location for his commitment and treatment under a NARA sentence, and that transfer to a location like Lewisburg would violate his right to treatment under NARA due process, equal protection, and the Eighth Amendment ban on cruel and unusual punishment.⁵ The Government defended the transfer, inter alia, as a valid exercise of the Attorney General's power to transfer inmates, and asserted that since Lewisburg contained a drug treatment program, albeit less comprehensive than Danbury's, the transfer was not barred by appellant's NARA sentence.⁶

Without assigning counsel or ordering a hearing, the district court denied appellant's application, on the following ground:

The choice of the appropriate place of confinement for the petitioner rests with the Attorney General. 18 U.S.C.A. §4082(b). Judicial review is appropriate only for abuse of discretion. There has been no such abuse here. The Government represents that the penitentiary at Lewisburg operates a drug

⁴See Government's answer to petition at 1, 3, set forth as "D" to the separate appendix to appellant's brief.

⁵See Appendix C at 3.

⁶See Appendix D at 5.

abuse unit which would be available to petitioner upon transfer. There appears to be no reason not to consider this unit an appropriate place of confinement for a N.A.R.A. prisoner. On facts similar to these, King v. Norton, 336 F.Supp. 255 (D. Conn. 1972), Judge Blumenfeld held that there is no impediment to a transfer from Danbury to Lewisburg.

Appendix B at 2.

This appeal followed.

ARGUMENT

THE TRANSFER OF APPELLANT FROM THE NARA UNIT AT DANBURY TO THE GENERAL PRISON POPULATION AT LEWISBURG VIOLATES APPELLANT'S RIGHT TO TREATMENT UNDER TITLE II OF NARA AND THE FIFTH AMENDMENT.

In his pro se application, appellant -- then, as now, serving a NARA commitment -- alleged that he was being transferred from an approved NARA facility to a federal penitentiary which is neither appropriate for or designed to treat NARA cases. The Government, in essence, failed to dispute this allegation. Indeed, it admitted that the narcotic treatment facilities for prison inmates at Lewisburg are not as extensive as those at Danbury (see Appendix D at 5). Moreover, there was no proof that appellant was likely to be admitted to the Lewisburg drug program. Nevertheless, the court below, without holding a hearing, determined that the mere existence of a drug treatment facility at Lewisburg made it an appropriate institution for appellant's NARA commitment.

We respectfully submit that the court's decision was incorrect, and that the transfer to Lewisburg violates appellant's statutory right to treatment specifically conferred by a sentence under NARA. Moreover, under these facts, appellant's transfer violates the Fifth Amendment, for, if implemented, it would deny appellant equal protection of the law by forcing him to undergo a sentence more extensive than he might have undergone had he not been committed under NARA, with no corresponding rehabilitative benefit.

A. The proposed transfer violates appellant's right to treatment under NARA, and is therefore not an appropriate designation.

In 1966, Congress enacted the Narcotic Addict Rehabilitation Act ("NARA") -- a major change in federal procedures for dealing with drug-addicted individuals. The broad purpose of the Act was to turn away from a purely penological approach and instead attempt to treat and rehabilitate via civil commitment the category of individuals who qualify for NARA treatment.

Thus, the Act itself explains:

[T]hat certain persons charged with or convicted of violating Federal criminal laws, who are determined to be addicted to narcotic drugs, and likely to be rehabilitated through treatment, should, in lieu of prosecution or sentencing, be civilly committed for confinement and treatment designed to effect their restoration to health, and return to society as useful members.

42 U.S.C. §3401.

See also H.R. Rep. No. 1486, 89th Cong., 2d Sess., 7 (1966). Under Title I of the Act, an eligible "addict" with federal charges pending may be committed before trial, with the charges dismissed upon completion of treatment. Under Title II -- the provision applicable in this case -- similar commitment for "treatment" is provided "in lieu of imprisonment" for those convicted of a federal crime. 18 U.S.C. §4251, 4253; United States v. Bishop, 469 F.2d 1337, 1339 (1st Cir. 1972). Under the statute, treatment is defined to include "confinement and treatment in an institution and under supervised aftercare in the community, and includes, but is not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services...." 18 U.S.C. §4251(c). Even a brief glance at the legislative history confirms beyond any doubt that it was the opinion of Congress in adopting this legislation that it was beginning a type of sentencing procedure fundamentally different from a normal prison term. Thus, the Senate Report accompanying the Act states:

S.2191, on the other hand, represents a fundamental and innovative orientation toward the problem of drug addiction and the handling of drug addicts. In brief, the bill is based upon the simple and historically unassailable fact that narcotic addiction cannot be cured merely by prosecuting and imprisoning addicts; hence, narcotic addicts, even those who have committed criminal offenses, should not be treated as common criminals in the spirit of retribution. Instead, S.2191 takes a more realistic approach of seeking to utilize the available tools of medicine and psychiatry,

reeducation and job training, family and neighborhood supervision, in an effort to cure the addict and return him to society physically and emotionally prepared to resist the temptations to return to drug usage and crime. This approach -- primarily rehabilitative rather than penal -- was firmly supported by every witness who testified before the subcommittee.....

S.Rep. No. 1667, 89th Cong.,
2d Sess., 13 (1966); see also
id. at 17; 112 Cong. Rec.
11813, 11897, 24419.

Pursuant to this Congressional direction, the Bureau of Prisons has opened and maintained "five facilities to handle addicts committed for treatment or study under Title II of the Act." Government brief in Marshall v. United States (414 U.S. 417 (1974)) at 11;⁷ Bureau of Prisons. Institutional Drug Program Descriptions (May 1976);⁸ Drug Abuse Programs Manual, Bureau of Prisons Policy Statement 8500.1 (April 20, 1973) at 1.⁹ These facilities are located at Milan, Michigan; Terminal Island, California; Alderson, West Virginia; Fort Worth, Texas; and Dan-

⁷Cited portions of the Government's brief in Marshall are included as "G" to the separate appendix to appellant's brief.

⁸Pertinent parts of the Institutional Drug Program Descriptions are included as "E" to the separate appendix to appellant's brief. At this Court's request, appellant will furnish a copy of the entire pamphlet.

⁹Pertinent portions of the Drug Abuse Programs Manual are set forth at "F" to the separate appendix to appellant's brief. At this Court's request, appellant will furnish a copy of the entire manual.

bury, Connecticut. Government brief in Marshall v. United States, supra, at 11 n.12; Institutional Drug Program Descriptions, supra. As an example of the treatment facilities available, according to the Bureau of Prisons there are two separate treatment units at Danbury; each functions "as a therapeutic community, utilizing a variety of ongoing, time limited, and problem focused groups. It is an action-oriented, total system concept structured around a variety of sequential cluster activities." See Institutional Drug Program Descriptions, supra, at 11, 16; (see also id. at 13-14, 17-18 for description of treatment program).

There is simply no doubt that the transfer of appellant to Lewisburg, if effectuated, will deprive appellant of this type of treatment. Unlike Danbury, the Lewisburg Penitentiary is not designated as a NARA facility; it does not contain NARA inmates. While the penitentiary contains a drug treatment unit, there is no evidence that appellant will be accepted into that unit or that there are any vacancies in the unit. In fact, priority in admitting individuals to the Lewisburg program is given to those inmates with close release dates. See Institutional Drug Program Descriptions, supra, at 35. Moreover, while appellant has an absolute right to treatment under NARA, he will be admitted into the Lewisburg drug abuse program only if approved after a final selection made "by inmates and staff." Ibid.

The Lewisburg program differs in other fundamental respects

from NARA treatment.

In enacting NARA, Congress set up a number of requirements which must be met by an individual before he can become an "eligible offender" for purposes of a NARA commitment. Thus, for example, an individual convicted of a violent crime, an individual convicted of the sale of narcotics when such sale was not for the purpose of supporting his habit, or an individual previously twice convicted of a felony is ineligible for NARA treatment. 18 U.S.C. §4251(f)). One of the reasons for these requirements is Congress' intent "to exclude from NARA treatment centers those it thought might be potentially disruptive elements within the sensitive environment of a drug treatment program." United States v. Marshall, 414 U.S. 417, 428 (1974); see, e.g., Marshall v. Parker, 470 F.2d 34, 39 (9th Cir. 1972); affirmed, 414 U.S. 417 (1974); United States v. Fersner, 465 F.2d 605 (D.C. Cir. 1972). Thus, the Supreme Court noted in Marshall that virtually all drug treatment programs include group therapy and contain strict institutional rules, both of which would be disrupted by placing NARA inmates with hardened addicts. Marshall v. United States, supra, 414 U.S. at 428 n.12.

Here, appellant, a NARA inmate, if transferred to Lewisburg, will be placed not in a therapeutic community like that in Danbury, but in a program in a penitentiary with precisely those hardened addicts Congress sought to segregate from NARA inmates. This is aggravated by the nature of the Lewisburg program, which emphasizes peer pressure:

Each inmate is required to write a personal resume to be presented to his group and to be revised on a continuing basis. Using the resume as an individual introduction to group work, the group member presents himself either honestly or dishonestly to his group. If he presents himself honestly with demonstrated sensitivity for the group, he is assisted then to constructively promote his individual goals by way of group reinforcement, as well as suggestions for behavior modification, and/or alternatives to his plan, as well as involvement with the resources existing both with the inmates and the staff within the unit. If, however, he presents himself dishonestly, the group pursues his dishonesty both collectively and individually, pursuing not only the obvious dishonesty of his statements, but also the rationale behind their construction. The importance of this "individual and group relationship" is common to all experiences in that the identification of both human weaknesses and strengths can ultimately become constructive in behavior modification.

The pursuit of unrealistic goals, exaggerated lifestyles, and freedom centered behavior, both by way of the resume and by way of acts of behavior in the unit, promote certain levels of antagonism with the groups. This antagonism when properly channeled into the unit, honestly exposed and directed to honest evaluation of inmates and their peers, promotes a climate in which an individual can and must change his behavior patterns to one where he can effectively deal with problems within his abilities and must abandon deceptions and ruses which center about problems that are not within his ability to control.

Institutional Drug Program
Descriptions, supra, at 36.
(emphasis added.)

Moreover, the NARA programs were established to help addicts, defined in §4251(a) as individuals using a drug listed in §102(16) of the Controlled Substances Act, i.e., opium derivatives and cocaine. In contrast, the Lewisburg and

other regular drug abuse programs run by the Bureau of Prisons apparently are available to non-addicts and abusers of any drug -- amphetamines or barbiturates, for example. See Drug Abuse Programs Manual, supra, at 1. Thus, any treatment given will not be geared specifically to appellant's narcotic addiction, but to more general drug abuse. The program will thus not be as reflective of appellant's specific needs as that considered advisable by Congress in enacting NARA.

Finally, the indisputable fact is that the transfer of appellant from the NARA unit at Danbury to Lewisburg will leave him in exactly the same position as any inmate serving a regular penal sentence at Lewisburg. This kind of "treatment" -- which obliterates the distinction between appellant's commitment "for treatment" and a regular penal sentence -- is simply and totally inconsistent with the congressional intent in enacting NARA -- to provide a clear alternative to penal sentences.

When appellant was sentenced pursuant to NARA, he became entitled to treatment under the Act. Cf. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (right to treatment exists for individual institutionally committed to public hospital where Congress has provided means to effectuate such treatment); Cruz v. Ward, ___ F.Supp. ___ (75 Civ. 5334, S.D.N.Y., December 20, 1976), appeal pending, Doc. No. 77-7043 (2d Cir.) (statutory right to treatment for mentally ill criminal inmate); see also Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964), on subsequent proceedings, Tippett v. Maryland, 436 F.2d 1163

(4th Cir. 1971), cert. dismissed sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972). Here, the transfer of appellant to a penitentiary will violate appellant's right to treatment under NARA. See United States v. Bishop, 469 F.2d 1337, 1342 n.11 (1st Cir. 1972) (although treatment of some sort might be afforded in prison, there are clearly major disadvantages, from both a personal and medical perspective, in being subjected to prison environment);¹⁰ cf. Harvin v. United States, 445 F.2d 675, 680 (D.C. Cir. en banc), cert. denied, 404 U.S. 943 (1971) (penitentiary improper location for youth offender sentence); United States v. Lowery, 484 F.2d 457 (3d Cir. 1973) (relief is appropriate if youth under YCA receiving no treatment and if conditions of confinement are no different from those of adult offenders).¹¹

¹⁰ In Bishop, the appellant attacked the two felony exclusion from NARA eligibility. The Government, as part of its response, informed the court that even if the appellant was ineligible for NARA, he was eligible for drug treatment in a penitentiary. The court rejected the notion that this fact mooted Bishop's claim in any way. Eventually, the First Circuit held the two felony exclusion violative of equal protection, a holding rejected by the Supreme Court in Marshall v. United States, *supra*. However, the rejection of this holding in no way affects the validity of the First Circuit's determination that a penal commitment is not equivalent to a NARA sentence.

¹¹ Thus, Meachum v. Fano, 96 S.Ct. 2532 (1976), and Montanye v. Haymes, 96 S.Ct. 2543 (1976), which hold that a prisoner may be transferred from one institution to another without a due process hearing, in the absence of an entitlement not to be transferred secured by state law, are inapposite. The question in this case is not the Attorney General's power to transfer, but appellant's right to be treated -- a right secured by federal statute.

Moreover, there is no doubt that none of appellant's rights to NARA treatment were lost because of his parole violation. The framers of NARA were intelligent enough to realize that there is no panacea for narcotic addiction problems, and that repeated treatment might be necessary before an addict would ultimately be free of his addiction. H.R. Rep. No. 1486, 89th Cong., 2d Sess., 3 U.S. Code Cong. & Admin News at 4252 (1966).

Of course, we recognize that the Attorney General has discretion to designate the place of confinement. 18 U.S.C. §4082 (b). However, that discretion is not absolute: the place of confinement must be "suitable and appropriate," and an improper designation by the Attorney General may be overturned if found to be arbitrary and capricious. Rodriguez-Sandoval v. United States, 409 F.2d 529, 532 (1st Cir. 1969), cert. denied, 414 U.S. 869 (1973); see, e.g., United States ex rel. Gereau v. Henderson, 526 F.2d 889, 897 (5th Cir. 1976); Ange v. Paderick, 521 F.2d 1066, 1068 (4th Cir. 1975); Lawrence v. Willingham, 373 F.2d 731 (10th Cir. 1967). Given the congressional mandate in establishing NARA and the fact that Lewisburg does not have a NARA unit, it is clear that Lewisburg is simply not an "appropriate" or "suitable" place for appellant's transfer.¹² Accordingly, the decision of the court below should be reversed.

¹²We also note that the asserted reason for transfer out of Danbury -- the fact that appellant's sentence aggregated more than five years -- was not rational. The facts are that the vast majority of NARA commitments are designed to be, and are, in fact, terms of more than five years. See population figures supplied by Bureau of Prisons, annexed as "H" to the separate appendix to appellant's brief.

B. Appellant's transfer, if effectuated, will violate his right to equal protection of law, protected by the Fifth Amendment's due process clause.¹³

In the above section, we have outlined the benefits which Congress intended to confer upon those individuals eligible for commitment to treatment under Title II of NARA. However, the benefits come in return for a specific quid pro quo from the inmate sentenced under NARA. For 18 U.S.C. §4253 requires that an eligible offender must be committed

... for an indeterminate period of time not to exceed ten years, but in no event shall it exceed the maximum sentence that could have been imposed.

This provision has been interpreted as requiring that the judge impose the maximum sentence possible for the crime or a ten-year sentence (United States v. Curtis, 523 F.2d 1134 (D.C. Cir. 1975); Baughman v. United States, 450 F.2d 1217 (8th Cir. 1971), cert. denied, 406 U.S. 923 (1972); United States v. Watkins, 330 F.Supp. 792 (D.D.C. 1971), affirmed, 475 F.2d 419 (D.C. Cir. 1973)), even if that sentence is far longer than that contemplated by that judge if a NARA commitment had not been imposed (Baughman v. United States, supra; United States v. Bishop, 487 F.2d 631 (1st Cir. 1973)). Thus, the inmate sentenced under NARA loses the opportunity for the judge to exercise his discretion to sentence him to a less than maximum or less than ten-year

¹³See Bolling v. Sharpe, 347 U.S. 497 (1954).

sentence. This deprivation suffered by eligible addicts -- supposedly those more worthy of leniency than the non-eligible -- although possibly leading to a longer confinement, will not offend equal protection so long as the confinement is both rehabilitative and under "different conditions and terms than a defendant would undergo in an ordinary prison." Carter v. United States, 306 F.2d 283, 285 (D.C. Cir. 1962) (Burger, J.) (interpreting Youth Corrections Act sentences); see also United States v. Dancis, 406 F.2d 729 (2d Cir.), cert. denied, 394 U.S. 1019 (1969).

Here, however, the Bureau of Prisons has sought to transfer appellant to the Federal Penitentiary at Lewisburg to serve a sentence with normal prison inmates with treatment identical to and under the same conditions as non-NARA inmates. Under such circumstances, appellant's sentence will result in a violation of equal protection, requiring a remand for resentencing. United States ex rel. Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974), cert. denied, 95 S.Ct. 1587 (1975).

Thus, in Sero, this Court held the former New York Reformatory Sentence for Young Misdemeanants violative of equal protection. The reformatory sentence required a four-year indeterminate term while adult misdemeanants could be incarcerated for only a year. This Court determined that the conditions of confinement for the youths was no different from that existing for adults, and then held that such being the case there was no rational basis for a longer sentence for youths. In so doing,

this Court rejected the notion that so long as the youths were receiving rehabilitative treatment it was irrelevant whether the same conditions existed for adults:

It is, of course, commendable that New York attempts to rehabilitate all convicted misdemeanants sentenced to terms of imprisonment. It is also praiseworthy that the state has tried to gear the various facilities within the jurisdiction of the Department of Corrections to achieve this end in a way which takes account of maturity, need, and the inmate's willingness to change. And yet to uphold the provisions of Article 75 would mean that one sentenced pursuant to it could be confined for four years in the same institution, under identical conditions, and with exactly the same rehabilitative program as an adult whose term could not under the law exceed three months to one year.

506 F.2d at 1124.

Here, of course, the facts are somewhat less dramatic. The eligible inmate is not required to serve a longer sentence by law, but is deprived of the exercise of the court's discretion to permit a shorter term. Nevertheless, it is clear that, in the absence of a quid pro quo, a totally capricious denial of judicial discretion where others similarly situated may enjoy the benefit of that discretion offends equal protection. See, e.g., United States v. Belt, 514 F.2d 837, 843 (D.C. Cir. 1975); United States v. Hairston, 495 F.2d 1046, 1051-1052 (D.C. Cir. 1974); United States v. Henson, 486 F.2d 1292, 1309 n.20 (D.C. Cir. 1973).¹³

¹³The above trio of cases considered the effect of 14 D.C. Code §305, which mandated the admission, in District of Columbia trials, of prior conviction evidence absent the trial judge's discretion, at a time when the other circuits permitted exercise

Nor can it be claimed that the extended confinement is justifiable because the eligible addict receives the benefit of a longer rehabilitation period. Again, this argument was answered by this Court in United States ex rel. Sero v. Preiser, supra, 506 F.2d at 1124:

Thus the present penal and correctional scheme leaves the class of reformatory-sentenced misdemeanants in the anomalous position of serving extended terms when "reformatories as well as the special purposes they historically served no longer exist...." They are, it is true, given rehabilitative treatment; but they are subject as well to the same punitive, deterrent, and isolating conditions as adult prisoners for substantially longer periods of time, and for this treatment we are unable to find any quid pro quo.

Since appellant's confinement at Lewisburg under conditions no different from those provided for ordinary inmates would offend equal protection, the transfer must be voided.

(Footnote continued from the preceding page)

of a trial judge's discretion before admission of such evidence. The result of Belt, Hairston, and Henson was to apply §305 only to D.C. Code offenses tried in the District of Columbia Superior Court; in trials of United States Code offenses D.C. Code §305 was held inapplicable, since the section, had it applied, would have placed defendants charged with United States Code offenses in the district of Columbia on different footing than those in the other circuits, a situation "fraught with equal protection overtones." United States v. Hairston, supra, 495 F.2d at 1052.

CONCLUSION

For the foregoing reasons, the order of the district court dismissing the petition should be reversed.

Respectfully submitted,

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I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
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